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Tax Flash News

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No virtual service permanent establishment constituted in India in the absence of specific provisions in tax treaty

Executive summary

In the case of *Clifford Chance Pte Ltd*[1], the Delhi High Court held that for the purposes of the 90-days threshold for establishing service permanent establishment (Service PE) under the India-Singapore tax treaty (the Treaty), employee's vacation days and business development days should be excluded as no services were rendered to the Indian clients during these days. Also, the common day (where more than one employee is present in India on the same day) should be counted as one.

Further, the Court rejected the Revenue's arguments of existence of virtual Service PE, holding that the provisions not expressly covered within the Treaty, cannot be read into by the courts. Accordingly, the physical presence of the employees in India providing services to the clients is a pre-condition for the constitution of Service PE.

[1] *CIT, International Tax* v. *Clifford Chance Pte Ltd* (ITA 353/2025)

Facts of the case

The taxpayer, a Singapore tax resident, was engaged in providing legal advisory services to clients in India.

During the financial year (FY) 2019-20, services to Indian clients were partly rendered remotely from outside India and partly through two employees physically present in India. The taxpayer contented that though its employees were physically present in India for 120 days, the 90-days threshold[2] for constituting Service PE was not met as these employees provided services to the clients only for 44 days (after excluding days on which the employees were on vacation or undertook business development activities and common days).

During FY 2020-21, services were rendered to the Indian clients from outside India and none of the employees visited India for rendering such services.

Accordingly, the advisory receipts were not taxable in India due to the absence of PE under the Treaty for both the years.

However, the Revenue alleged that the taxpayer had a Service PE in India in the FY 2019-20 since the number of days of stay of employees in India exceeded the prescribed 90-days threshold under the Treaty. It was further contended that virtual Service PE was constituted for both the FYs since advisory services were rendered to Indian clients from outside India.

The Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) ruled in favour of the taxpayer and held that actual performance of services in India by the employees physically present in India is essential for computing threshold limit for constituting a Service PE under the Treaty.

Aggrieved by the Tribunal's decision, the Revenue filed an appeal before the Delhi High Court.

Relevant provisions

As per the Service PE clause of the Treaty, a Singaporean resident will have a PE in India if it furnishes services[3] within India through employees or other personnel and the activities of that nature continue within India for a period or periods aggregating more than 90 days in any financial year.

[2] Article 5(6)(a)

[3] Other than technical services as defined in Article 12

Revenue's contentions

Vacation days should not be excluded for the purposes of computing the 90-days threshold. Further, no reliable documentary evidence was furnished by the taxpayer to prove that the employees were on vacation during their stay in India. Accordingly, Service PE was constituted for FY 2019-20 as the 90-days threshold was met.

Virtual Service PE was constituted in both FYs as services were rendered remotely to the Indian clients. There is no mention of the phrase 'physical presence' of employees for constitution of Service PE under the Treaty.

The taxpayer's employees were continuously furnishing services in India since FY 2016-17. It is the continuance of services that is relevant for the threshold limit of 90-days (and not the physical presence of the employees). If there is continuity of the business operations, the intermittent presence or return of a particular employee become immaterial in determining the existence of PE.[4]

With rapid digitisation, services can be provided remotely without requiring physical presence of the employees in the country where clients are located. OECD Interim Report 2018[5] and jurisdictions like Saudi Arabia, Israel and Kuwait have also recognised that a virtual Service PE is constituted where services are performed offshore.

Relied on the decision of the Bengaluru Bench of the Tribunal in the case of *ABB FZ-LLC*[6], wherein the concept of virtual Service PE was recognised, and it was held that the key criterion for establishing a Service PE is the rendition of services, not the physical presence of employees in the source country.

Taxpayer's contentions

To constitute a Service PE of the foreign enterprise in India, actual performance of services through the employees or other personnel physically present 'within' India is essential.[7]

Only the days on which services were rendered by the employees within India should be considered.

[4] *Hyatt International Southwest Asia Ltd.* v. *ADIT* [2025] 478 ITR 238 (SC)

[5] Tax Challenges Arising from Digitalisation –Interim Report 2018 by OECD

[6] *ABB FZ-LLC* v. *DCIT* [2017] 166 ITD 329 (Bang). The Revenue also relied on certain foreign jurisdiction decisions which were distinguished by the High Court as they dealt with different issue.

[7] *DIT* v. *E-Funds IT Solution* [2014] 364 ITR 256 (Del) – affirmed by Supreme Court [2017] 399 ITR 34

The following days should be excluded for the threshold limit of 90-days:

- Vacation days (36 days) – Employees were on personal leave, and no services were rendered by them to Indian clients during the leave days, as substantiated by the employees' time sheets, leave records etc.
- Business development days (35 days) – Activities undertaken by employees were aimed at exploring new clients in India and no services were rendered to the clients on those days.
- Common days (5 days) – where more than one employee is present in India on the same day, such day should be counted as one (i.e. solar days and not man-days).

After excluding the above, as the employees rendered services to Indian clients for 44 days, the prescribed threshold was not met and thus, no Service PE was constituted in India.

There is no express provision in the Treaty regarding establishment of a virtual Service PE. Reliance placed by Revenue on the OECD Interim Report 2018 was incorrect as the Report only refers to a minority view expressed by some countries that the requirement of physical presence is no longer relevant for the constitution of Service PE as services can be rendered from remote locations as well. The Report also mentions that in the absence of amendments to tax treaties, the constitution of virtual Service PE can be challenged by the taxpayers.

High Court's decision

The Delhi High Court upheld the Tribunal's order and affirmed that no Service PE of the taxpayer was constituted in India in either of the years. Key observations included:

Only the days on which actual services were rendered by the employees of the taxpayer to the Indian clients during their stay in India need to be considered while computing the threshold limit of 90-days under the Treaty.

The phrases "*within a Contracting State*" and "*through employees or other personnel*" used in the Treaty contemplates rendition of services in India by the employees of the taxpayer, while mandating a fixed nexus, a physical footprint within India. The term "*within*" has a certain territorial connotation and in the absence of employees or other personnel physically performing services in India, there can be no furnishing of services "*within*" India and hence, no Service PE.

The concept of virtual Service PE is not covered in the Treaty. Any provision/ language which is not explicitly included in a tax treaty cannot be artificially read by way of judicial fiction. If something is conspicuous by its absence, the presumption is that such absence is deliberate, and the courts should not read in concepts which are not clearly stated in the agreement.

While there are certain foreign jurisdictions which have moved away from the requirement of physical presence of employees to constitute a Service PE, however, the same approach has not been administratively recognised by India.

Introduction of Significant Economic Presence (SEP) concept in the Income-tax Act, 1961 reflects India's deliberate policy to capture digital or virtual economic participation outside the traditional PE framework. In the absence of necessary changes in the tax treaty provisions, such developments do not alter the interpretative constraints imposed by the wordings of the tax treaty. Until Service PE clause of the Treaty is renegotiated or supplemented, the existing Treaty framework does not extend to virtual or digital services provided from outside India.

The High Court distinguished cases cited by the Revenue as these were factually and contextually different from the instant case.

Our comments

The High Court has reaffirmed that for constituting a Service PE in India, only the duration for which employees are physically present in India to provide services should be considered. The Court expressly rejected the notion of a virtual Service PE, emphasising that such a concept cannot be applied in the absence of a specific provision within the tax treaty.

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